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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. IVAN CHAPARRO GARCIA, Appellant.	2 CA-CR 2009-0103 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-46011

Honorable Richard S. Fields, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Jonathan Bass — Tucson
Attorneys for Appellee

Peter B. Keller — Tucson
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 Appellant Ivan Garcia challenges his conviction for possession of a narcotic drug, arguing the trial court erred in permitting him to be tried in absentia. Garcia also

maintains the state presented insufficient evidence to support the jury's verdict. For the reasons set forth below, we affirm.

Facts and Procedure

¶2 We view the facts in the light most favorable to sustaining the conviction. *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). On June 12, 1994, Tucson Police Officer Timpf stopped a car driven by Garcia for failure to stop at a stop sign. Garcia spoke only Spanish, and because he was not a United States citizen and was unable to verify his immigration status, Timpf called the United States Border Patrol and requested the assistance of a Spanish-speaking officer. A Border Patrol agent spoke with Garcia and subsequently arrested him. Incident to that arrest, Garcia emptied his pockets and produced a packet that later was determined to contain cocaine. The agent then turned Garcia over to Timpf's custody.

¶3 A grand jury indicted Garcia for possession of cocaine. He posted bond and was released from custody. At his arraignment, the court appointed counsel and informed Garcia of the dates for two subsequent hearings. When he failed to appear at either hearing, the trial court issued a bench warrant for his arrest. The court subsequently ruled Garcia could be tried in absentia, and following a two-day trial, the jury found him guilty as charged.

¶4 In 2008, Garcia was arrested for new felony charges and brought before the trial court for sentencing in this matter. The court suspended the imposition of sentence and placed Garcia on probation for six months, including a jail term of 266 days, with credit for time served. This appeal followed.

Discussion[1]

¶5 Preliminarily, the state argues this appeal should be dismissed for lack of jurisdiction under A.R.S. § 13-4033(C). That statute eliminates a nonpleading defendant's right to a direct appeal when "the defendant's absence prevents sentencing from occurring within ninety days after conviction and the defendant fails to prove by clear and convincing evidence at the time of sentencing that the absence was involuntary." § 13-4033(C). The state contends that, by absconding from 1994 to 2008, Garcia caused his sentencing to occur more than ninety days after his conviction and he has failed to establish his absence was involuntary.

¶6 However, in *State v. Soto*, 223 Ariz. 407, ¶ 14, 224 P.3d 223, 228 (App. 2010), this court held § 13-4033(C) unconstitutional except in those cases where the state can "establish[] that a defendant's voluntary failure to appear timely for a sentencing hearing demonstrates a knowing, voluntary, and intelligent waiver of his constitutional right to appeal." Such a showing can be made when a defendant is advised personally that "his failure to appear at sentencing would result in a waiver of his appeal rights." *Id.* ¶¶ 14, 18-19. Because Garcia was convicted in February 1995, thirteen years before

[1]We note that legal argument, citation to the parts of the record relied upon, and citation to the authorities supporting the specific arguments made are almost wholly lacking in Garcia's brief. It thus generally fails to comply with our rules of criminal procedure. *See* Ariz. R. Crim. P. 31.13(c)(vi) (appellant shall provide argument containing "contentions . . . with respect to the issues presented, *and the reasons therefor*, with citations to the authorities, statutes, and parts of the record relied on") (emphasis added). Although we could treat this failure as a waiver of the claims raised, *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995), in the exercise of our discretion, nonetheless, we have elected to consider them.

§ 13-4033(C) was enacted, presumably he was not so advised. *See* 2008 Ariz. Sess. Laws, ch. 25, § 1. We therefore address the merits of his appeal.

¶7 Garcia argues "the record is insufficient to support a finding that [he] waived his presence" at trial. "An accused's 'right to be present at trial is protected both by the Sixth Amendment to the federal constitution as incorporated and applied to the states through the Fourteenth Amendment, and by article II, section 24 of the Arizona Constitution.'" *State v. Garcia-Contreras*, 191 Ariz. 144, ¶ 8, 953 P.2d 536, 538 (1998), *quoting State v. Levato*, 186 Ariz. 441, 443, 924 P.2d 445, 447 (1996). A defendant nonetheless may "waive the right to be present at any proceeding by voluntarily absenting himself or herself from it." Ariz. R. Crim. P. 9.1. And we review for an abuse of discretion a trial court's determination that the defendant voluntarily was absent from trial. *State v. Muniz-Caudillo*, 185 Ariz. 261, 262, 914 P.2d 1353, 1354 (App. 1996).

¶8 The trial court may infer a defendant's absence is voluntary if he had notice of the date and time of the proceeding, his right to be present, and a warning that the proceeding would take place in his absence if he failed to appear. *Id*. That inference also can be drawn when a defendant, "although technically without personal notice of his trial date, failed to appear at any subsequent proceedings or keep in contact with trial counsel to ascertain his trial date." *Id*.; *see also State ex rel. Romley v. Superior Court*, 183 Ariz. 139, 144-45, 901 P.2d 1169, 1174-75 (App. 1995) (absence voluntary where defendant warned he could be tried in absentia, told to maintain contact with attorney, but escaped before advised of new trial date).

¶9 At the arraignment, the trial court advised Garcia "that [his] . . . failure to appear for trial could result in the trial proceeding in [his] absence." And, at the sentencing hearing, counsel confirmed that Garcia also had been "advised to maintain contact with his attorney." Although Garcia did not have personal notice of his trial date, he was aware of the date of the pretrial conference at which the trial date was set. He failed to appear at the pretrial conference and failed to maintain contact with trial counsel to learn of the trial date. This was a sufficient basis for the court to presume Garcia had voluntarily absented himself from his trial. *See Muniz-Caudillo*, 185 Ariz. at 262, 914 P.2d at 1354; *Romley*, 183 Ariz. at 144-45, 901 P.2d at 1174-75.

¶10 The only explanation Garcia provided at sentencing for his absence from trial was that he "lost track" of the case. This was insufficient to overcome the court's original finding that Garcia's absence was voluntary. *See State v. Sainz*, 186 Ariz. 470, 473, 924 P.2d 474, 477 (App. 1996) (rebuttable inference under Rule 9.1 that any absence from proceeding voluntary). The court therefore did not abuse its discretion in finding Garcia's absence voluntary and conducting his trial in absentia.

¶11 Garcia next argues the state "failed to prove beyond a reasonable doubt that [he] . . . was the person arrested by officer Timpf." He contends the booking photograph used to identify him at trial was not authenticated properly and the trial court erred in admitting it. We review a trial court's admission of evidence for an abuse of discretion. *State v. Montano*, 204 Ariz. 413, ¶ 55, 65 P.3d 61, 73 (2003). He also asserts that, even with the photograph, the state presented insufficient evidence to prove his identity at trial. But, Garcia did not base his motion for judgment of acquittal, pursuant to Rule 20, Ariz.

R. Crim. P., on the ground of identity below. We thus review his sufficiency of the evidence claim for fundamental, prejudicial error only. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶12 At trial, the state sought to introduce evidence of Garcia's booking photograph to establish the person on trial was the person arrested for the offense. Counsel objected to the admission of the photograph based on lack of foundation, arguing Timpf could not describe how it had been taken. Timpf merely identified the man in the picture as the man he had arrested for this offense.

¶13 "'To be admissible, a photograph must be a reasonably faithful representation of the object depicted and aid the jury in understanding the testimony or evaluating the issues.'" *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 7, 186 P.3d 33, 35 (App. 2008), *quoting Lohmeier v. Hammer*, 214 Ariz. 57, ¶ 8, 148 P.3d 101, 105 (App. 2006). To establish a proper foundation, the verifying witness need only attest that the photograph accurately depicts what it purportedly shows. The verifying witness need not have been the photographer or even present when the photograph was taken. *Id*. Officer Timpf unequivocally identified the photograph as depicting the man he had arrested on June 12 for cocaine possession. This was sufficient foundation for the admission of the photograph. *See id*.

¶14 Furthermore, the state offered sufficient evidence of Garcia's identity at trial. When a defendant voluntarily has absented himself from trial, "[i]t is not enough to argue . . . that identification was lacking because the state did not put on proof that the man on trial . . . physically 'matched' the man they arrested. . . . At a minimum, [a]

defendant must assert that he is *not* the man who was arrested at the [crime] scene." *State v. Rocha-Rocha*, 188 Ariz. 292, 295, 935 P.2d 870, 873 (App. 1996). Thus, "[t]he real question is not whether the evidence was sufficient to convict the [defendant] described but whether the [defendant] who was sentenced is the same person as the man initially arrested for the crime." *State v. Hall*, 136 Ariz. 219, 221, 665 P.2d 101, 103 (App. 1983).

¶15 The booking photograph included a physical description of Garcia, his date of birth, the date of his arrest, and the Tucson Police Department case number assigned to the investigation. Another police officer, who had testified before the grand jury, testified at trial that his grand jury testimony was based on a police report with the same case number as that on Garcia's booking photograph. And at no time during sentencing did Garcia suggest he was not the person convicted of this crime. In fact, he effectively admitted he was the person initially arrested when he apologized for absconding and stated he had simply "lost track" of the proceedings. Viewed together, this evidence was sufficient to establish Garcia's identity as the person arrested, indicted, and tried for this offense. *See Rocha-Rocha*, 188 Ariz. at 295, 935 P.2d at 873; *Hall*, 136 Ariz. at 221, 665 P.2d at 103. Garcia's conviction was not the product of error, let alone fundamental, prejudicial error.

Disposition

¶16 For the reasons set forth above, we affirm Garcia's conviction and sentence.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge